


EXHIBIT I

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Dan Steenson

From: Candice M. McHugh [cmm@racinelaw.net] **Sent:** Mon 10/1/2007 6:04 PM
To: Dan Steenson; jmay@may-law.com; Robert E. Williams; Adam DeVoe; C. Tom Arkoosh; James S. Lochhead, Esq.; James Tucker, Esq.; jar@idahowaters.com; jo.beeman@beemanlaw.com; kmarioncarr@yahoo.com; Matt J. Howard ; mike.gilmore@ag.idaho.gov; mcc@givenspursley.com; Paul Arrington; rdl@idlawfirm.com; sarahk@white-jankowski.com; tuhling@simplot.com; Travis Thompson; wkf@pmt.org
Cc: Amy Beatie; Randy Budge
Subject: Proposed Schedule
Attachments:  Proposed Schedule.doc(42KB)

Counsel:

In an effort to try and revise the deposition schedule in the cases in the spirit that we discussed at the end of today's status conference by including the deposition of Karl in both cases, and to accommodate the schedules for counsel that are in both cases attached hereto is a proposal.

Instead of putting the depositions the week of October 22, 2007 in Denver, I propose to keep it in Boise and move Brendecke to the following week instead of Brockway. I tried to accommodate some dates that I understood to be unavailable for certain counsel and have also tried to make sure that key experts were available to attend other expert depositions if necessary.

I haven't confirmed with Church his availability November 5-9 so that is tentative; I also am not sure whether he is needed for two days total: a full day in each case. It seems that one day for both cases would suffice.

Kathleen, please confirm that Mike Beus is off the list and whether or not the BOR room is available for McGrane and Raff's depositions as proposed.

Finally, I am out of town tomorrow through Sunday so I will hand off further coordination of the schedule to Randy.

Candice M. McHugh

Racine, Olson, Nye, Budge & Bailey, Chartered

101 S Capitol Blvd., Ste. 208

Boise, ID 83702

TSP/SWC PRE-HEARING/HEARING SCHEDULES:

Deadline Description	TSP (130)	SWC (120)
Deadline for expert reports, pre-filed direct testimony (required for retained consultants/optional for others) and all exhibits to be used at hearing with experts	9/12/07	9/26/07
Deadline for rebuttal reports, pre-filed rebuttal testimony and all exhibits to be used in rebuttal	10/10/07	11/7/07
Disclose all lay witnesses/identify all exhibits to be used at hearing with lay witnesses (as well as any pre-filed direct testimony for lay witnesses, if desired)	10/17/07	11/14/07
Deposition deadline/discovery completed deadline	11/1/07	11/28/07
Written opening brief/trial brief (if desired)	11/15/07	12/21/07
Pre-hearing conference and hearing on pre-hearing motions	11/16/07	1/4/08
Hearing commences	11/28-12/18/07	1/16-2/6/08

October SWC Deposition Schedule

9 – Franzoy
 10 – Shaw/Young
 11 – Carlson
 12 – King/Petrich

15 – Thurin
 16 – Sullivan
 17 – Sullivan
 18 – Koreny
 19 – Koreny

This week in Boise

22 – Dreher
 23 –
 24 –
 25 – Brockway
 26 – Brockway

29 – Brendecke
 30 – Brendecke
 31 – McGrane
 Nov. 1 – Raff

TSP Deposition Schedule

11 – Tim Luke/Allen Wylie

17 – Larry Land (Blue Lakes)

23 – Dreher
 24 – Harmon (Clear Springs)
 25 – Carlson (IGWA)

31 – Brockway (Clear Springs)
 Nov. 1 – Brendecke (IGWA)
 5–9 Church (IGWA) 1 day

Dan Steenson

From: Candice M. McHugh [cmm@racinelaw.net]
Sent: Monday, October 15, 2007 4:31 PM
To: jks@idahowaters.com; Dan Steenson
Cc: Randy Budge
Subject: Lay witness testimony

Can we all agree that lay witness pre-filed testimony can be filed no later than the pre-trial brief deadline, 11/15/07 if we choose to file pre-filed testimony? We would all still need to disclose our lay witnesses and general area of testimony and exhibits by this Wednesday, 10/17/07.

Candice M. McHugh
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Dan Steenson

From: Dan Steenson
Sent: Monday, October 22, 2007 1:50 PM
To: Candice M. McHugh; Travis Thompson; Randy Budge
Cc: John Simpson; Paul Arrington
Subject: RE: Summary Judgment - CS / BL Case

Candice,

Have you sent an email as we discussed summarizing the agreement regarding discovery that you, John and I reached last Thursday? With all that is going on, I may have missed it. Please advise.

Dan.

From: Candice M. McHugh [mailto:cmm@racinelaw.net]
Sent: Monday, October 22, 2007 9:03 AM
To: Travis Thompson; Randy Budge
Cc: John Simpson; Paul Arrington; Dan Steenson
Subject: RE: Summary Judgment - CS / BL Case

Travis,

Mary sent it out on Friday at 4:41 and it was filed at IDWR and delivered to Schroeder. Mary just resent it and then sent it again this morning with the sent time on it from Friday.

Candice M. McHugh
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From: Travis Thompson [mailto:tlt@idahowaters.com]
Sent: Monday, October 22, 2007 7:56 AM
To: Randy Budge; Candice M. McHugh
Cc: John Simpson; Paul Arrington; dvs@ringertclark.com
Subject: Summary Judgment - CS / BL Case

Randy, Candice

I haven't seen any briefing from IGWA regarding the summary judgment motions in the case. Please email copies to those listed above this morning if you filed anything on Friday.

Thanks,

Travis

Dan Steenson

From: Randy Budge [rcb@racinelaw.net]
Sent: Monday, November 05, 2007 9:51 PM
To: John Simpson
Cc: Randy Budge; Candice M. McHugh; Dan Steenson; Rassier, Phil; Strong, Clive
Subject: RE: Dunn Deposition

John:

I will be back in the office Wednesday if you would like to call then to discuss this.

When we last discussed the matter and you asked for deposition dates for lay witnesses I thought I had made it clear that we did not consider depositions of lay witnesses to be within the scheduling stipulation and order, only expert depositions. Further, that in any event there were no available dates in October as all were filled with expert depositions in the TSP and SWC cases. You inquired if that mean you had to take the matter up with Justice Schroeder to get authorization to depose lay witnesses and I indicated yes. I have not heard from you since. With the discovery deadline on lay witnesses expired November 1 we continue to object to any lay witness depositions.

As I indicated, we will be pre-filing lay testimony of all those we anticipate calling as witnesses which will provide the substance. Others are disclosed so they may be used for rebuttal or as otherwise may be needed depending on you lay witnesses. By the way your lay witness disclosure does not provide the required substance of their testimony as I believe is required and we request be properly disclosed.

As to Ken Dunn as he is an independent witness and former IDWR employee I suggest you notify Phil Rassier or Clive Strong. I do not have his number available but will locate it when I get back in the office.

Randy

From: John Simpson [mailto:jks@idahowaters.com]
Sent: Monday, November 05, 2007 4:43 PM
To: Randy Budge; Candice M. McHugh
Subject: Dunn Deposition

Randy,

I again talked with Candice regarding taking Ken Dunn's deposition. I asked for either dates or a phone number given that he describes his testimony as one of an independent witness. My first contact with Candice was on October 18th, when I requested available dates for each of the witnesses you identified associated with the Swan Falls issue. Dates for the remaining individuals s still requested. If you do not want to provide me access to these folks, please respond so that the appropriate action can be taken.

Thanks

John K. Simpson
Barker Rosholt & Simpson LLP
208-336-0700-phone
208-344-6034-fax

Dan Steenson

From: Randy Budge [rcb@racinelaw.net]
Sent: Tuesday, November 06, 2007 9:41 PM
To: John Simpson
Cc: Randy Budge; Dan Steenson; Candice M. McHugh
Subject: Ken Dunn

John:

My rate case got settled today and I will be back in the office and available in the late afternoon tomorrow if you wish to talk about Ken Dunn.

I have not had any conversations with Dunn. Candice did visit with him about providing you his phone number and your desire to take his deposition. He indicated you already had his number as he had spoke with John Rosholt and provided him his phone number last summer. He apparently lives in the San Diego area and is reluctant to provide a depositions.

If you intend to seek authorization from the Hearing Officer to amend the scheduling order to take lay depositions or otherwise notice them up please let me know in advance so we will have a full and fair opportunity to present our objections.

Thanks.

Randy Budge

(208) 395-0011

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EXHIBIT J



News Release

IDAHO DEPARTMENT OF WATER RESOURCES

The Idaho Water Center, 322 E. Front St., Boise, ID - TEL: (208) 287-4800 FAX: (208) 287-6700
www.idwr.idaho.gov

Release 2007-24

For Immediate Release
Boise, Idaho – April 30, 2007

For Media Information Contact:
Bob McLaughlin – 208-287-4828

IDWR Director Issues Letters Warning of Mandatory Curtailment in the Thousand Springs Area

Idaho Department of Water Resources Director David Tuthill today signed letters to ground water users in the Thousand Springs area warning that he intends to issue orders on May 14th requiring potential curtailment of their ground water rights. The warning letters are issued as part of a continuing response to water delivery calls made in 2005 by senior water right holders Blue Lakes Trout Farm and Clear Springs Food's Snake River Farm.

The delivery calls were made under the Department's Rules for Conjunctive Management of Surface and Ground Water Sources. If required, the curtailment orders will affect certain ground water users with junior water rights in portions of Blaine, Butte, Gooding, Jerome, Lincoln, and Minidoka counties in South Central Idaho.

Water calls and curtailment orders are necessary to satisfy the director's duty under Idaho law to administer water rights in accordance with the prior appropriation doctrine in times of shortage. "While we are forced to provide this notice, there is still an opportunity to identify additional mitigation. Curtailment is a last resort but we are obligated under Idaho law to follow through with enforcement if mitigation is not provided," said Idaho Department of Water Resources Director David Tuthill.

(more)

If issued, given the present mitigation plan, the curtailment orders could affect ground water rights bearing priority dates junior to May 10, 1983 for the Blue Lakes call and junior to June 9, 1975 for the Clear Springs call. This includes 771 ground water rights for irrigation, commercial, industrial, municipal, non-exempt domestic and stockwater, and other consumptive uses. Non-consumptive and culinary in-house uses of water will not be subject to curtailment under the orders.

A water call is made when the holder of a senior water right experiences a shortfall in the amount of water the holder is entitled to receive and is beneficially using in accordance with law. The call is made on the water source. Under the conjunctive management rules, the Department will then require the holders of junior water rights to mitigate the effects of their diversions or stop diverting water in order to allow more water to satisfy the senior right.

Information on the curtailment orders can be found on the Idaho Department of Water Resources' web site at www.idwr.idaho.gov under the headings "Major Issues" and "What's New." The web site features maps of the affected areas, copies of the letters issued to water rights holders, legal documents, and related links.

(end)

EXHIBIT K

Randall C. Budge (ISB #1949)
Candice M. McHugh (ISB #5908)
RACINE OLSON NYE BUDGE &
BAILEY, CHARTERED
201 E. Center Street
P.O. Box 1391
Pocatello, ID 83201
Telephone: (208) 232-6101
Facsimile: (208) 232-6109

Attorneys for Plaintiffs

N:\RCB\222 - IGWA\THOUSAND SPRINGS DELIVERY CALL-MITIGATION PLAN (34146)\PLEADINGS\COMPLAINT.FINAL.DOC

DISTRICT COURT
FIFTH JUDICIAL DIST
JEROME COUNTY, IDAHO

2007 MAY 7 2PM 1 05
Michelle Emerson

BY *[Signature]*
DEPUTY CLERK
RECEIVED

MAY 09 2007
DEPARTMENT OF
WATER RESOURCES

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME**

IDAHO GROUND WATER APPROPRIATORS,)
INC., MAGIC VALLEY GROUND WATER)
DISTRICT, and NORTH SNAKE GROUND)
WATER DISTRICT,)

Plaintiffs,)

vs.)

THE IDAHO DEPARTMENT OF WATER)
RESOURCES and DAVID R. TUTHILL, JR.,)
IN HIS OFFICIAL CAPACITY AS)
DIRECTOR OF THE IDAHO DEPARTMENT)
OF WATER RESOURCES,)

Defendants.)

Case No. CN 2007-526

**COMPLAINT FOR DECLARATORY
RELIEF, WRIT OF PROHIBITION,
TEMPORARY RESTRAINING
ORDER AND PRELIMINARY
INJUNCTION**

COMES NOW the Plaintiffs, IDAHO GROUND WATER APPROPRIATORS, INC.,
MAGIC VALLEY GROUND WATER DISTRICT, and NORTH SNAKE GROUND WATER
DISTRICT on behalf of their members (collectively referred to herein as "Plaintiffs"), by and through

COMPLAINT FOR DECLARATORY RELIEF, WRIT OF PROHIBITION, TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION

counsel, and submit this Complaint for Declaratory Relief, Writ of Prohibition, and Request for Temporary Restraining Order and Preliminary Injunction against the Idaho Department of Water Resources and David R. Tuthill, Jr., in his official capacity as Director of the Idaho Department of Water Resources (collectively referred to herein as "IDWR").

PARTIES

1. Plaintiffs bring this action in their representative capacity on behalf of their members who own lawful and vested ground water rights that will be adversely affected by the proposed May 14, 2007, Curtailment Order of IDWR (the "Curtilment Order"). The Curtailment Order is referenced in IDWR's April 30, 2007, *Notice of Potential Curtailment of Ground Water Rights in the Thousand Springs Area*. A copy of said Notice and the attached maps, owner list, and water rights list are attached hereto as Exhibit A and incorporated by reference.

2. Plaintiff Idaho Ground Water Appropriators, Inc. ("IGWA") is an Idaho nonprofit corporation whose members include American Falls-Aberdeen Ground Water District, Bingham Ground Water District, Bonneville-Jefferson Ground Water District, Madison Ground Water District, Magic Valley Ground Water District, North Snake Ground Water District, municipal water providers, commercial and industrial entities, and individuals operating within the state of Idaho who depend upon ground water from the Eastern Snake Plain Aquifer for irrigation, municipal, commercial, industrial, and other authorized beneficial uses.

3. Plaintiff Magic Valley Ground Water District is a ground water district organized and existing pursuant to Idaho Code § 42-5201 et seq., and represents approximately 330 owners of ground water rights serving irrigation, municipal, commercial, industrial and other beneficial uses,

including the irrigation of approximately 125,000 acres of farmland in southern Idaho in Minidoka, Lincoln, Jerome and Blaine Counties.

4. Plaintiff North Snake Ground Water District is a ground water district organized and existing pursuant to Idaho Code § 42-5201 et seq., and represents approximately 400 owners of ground water rights serving irrigation, municipal, commercial, industrial and other beneficial uses, including the irrigation of approximately 106,600 acres of farmland in southern Idaho in Gooding, Jerome and Lincoln Counties.

5. Magic Valley Ground Water District and North Snake Ground Water District operate as political subdivisions of the state of Idaho under Idaho Code § 42-5224(6) and are authorized thereby to represent district members with respect to their individual water rights in legal and administrative proceedings.

6. The locations and boundaries of Magic Valley Ground Water District and North Snake Ground Water District are depicted on the map attached hereto as Exhibit B and incorporated by reference.

7. Defendant Idaho Department of Water Resources is an executive department existing under the laws of the state of Idaho pursuant to Idaho Code § 42-1701 et seq.

8. Defendant David R. Tuthill, Jr., is the Director of the Idaho Department of Water Resources and is an Idaho resident.

JURISDICTION AND VENUE

9. Jurisdiction is proper in this District Court pursuant to Idaho Code §§ 7-401 et seq. (writ of prohibition) and 10-1201 (declaratory judgment), Idaho Rule of Civil Procedure 65 (injunctive relief), and in its capacity to provide equitable relief.

10. This Court, sitting in Jerome County, is the proper venue for this matter pursuant to Idaho Code §§ 5-402 and 67-5272 because the proposed Curtailment Order affects real property located in Jerome County and because affected members of the Magic Valley Ground Water District and North Snake Ground Water District reside in Jerome County.

ALLEGATIONS COMMON TO ALL COUNTS

11. On March 16, 2005, Billingsley Creek Ranch sent a letter to IDWR requesting delivery of water. On March 22, 2005, Blue Lakes Trout sent a letter to IDWR requesting delivery of water. On May 2, 2005, Clear Springs Foods on behalf of its Snake River Farm and Crystal Springs Farm facilities submitted letters to IDWR requesting water rights administration. On May 10, 2005, John W. Jones by a letter dated April 12, 2005, sent a request to IDWR for delivery of water. These letters will be collectively referred to herein as the "2005 Delivery Calls." Following the 2005 Delivery Calls, IDWR issued a series of orders, including the following two orders for curtailment of ground water rights: Order of May 19, 2005, in the *Matter of Distribution of Water Right to Water Right Nos. 36-02356A, 36-07210, and 36-07427 (Blue Lakes)* and Order of July 8, 2005, in the *Matter of Distribution of Water to Water Rights Nos. 36-04013A, 36-04013B, and 36-07148 (Snake River Farm)*; and to *Water Right Nos. 36-07083 and 36-07568 (Crystal Springs Farm)* (referred to herein as the "2005 Orders").

12. Rangen, Inc., Blue Lakes Trout Farm, Inc., Clear Lakes Trout Company and Rim View Trout Company submitted letters to IDWR dated January 17, 2007, and January 19, 2007, requesting that IDWR curtail Plaintiffs' use of their water rights. These letters are referred to collectively herein as the "2007 Delivery Calls." Copies of the 2005 Delivery Calls and the 2007 Delivery Calls are attached hereto as Exhibit C and are referred to collectively herein as the "Delivery Calls." The entities listed in Paragraph 11 above and the entities listed in this Paragraph 12 are referred to collectively herein as the "Spring Users."

13. The Delivery Calls allege injury to the Spring Users' water rights identified in Exhibit D attached hereto (collectively the "Spring Users' Water Rights").

14. The Spring Users' Water Rights are used for year-round fish propagation purposes and have as their source ground water from the Eastern Snake Plain Aquifer ("ESPA") which is supplied by artesian pressure from various springs, or surface streams created by such springs, located in the vicinity of Hagerman, Idaho.

15. The ground water right holders against whom the Delivery Calls are directed are all located within Water District 120, Water District 130, and Water District 140, which districts were created by IDWR pursuant to Idaho Code § 42-604. The locations and boundaries of said Water Districts are depicted on the map attached hereto as Exhibit B.

16. Magic Valley Ground Water District partially lies within Water Districts 130 and 140. North Snake Ground Water District lies wholly within Water District 130.

17. On April 30, 2007, IDWR issued a Curtailment Notice stating that certain ground water diversions in Ground Water Districts 120 and 130 will be curtailed pursuant to the Curtailment Order.

18. The Curtailment Order will result in the curtailment of water rights owned by certain members of Magic Valley Ground Water District and North Snake Ground Water District located within Water Districts 120 and 130. According to IDWR, the proposed curtailment will eliminate the supply of irrigation water to an estimated 33,000 acres.

19. According to IDWR, the proposed curtailment may increase surface water discharges to the Snake River somewhere between the Devil's Washbowl and the Buhl Springs reach by an estimated 30 cubic feet per second (cfs), and may increase surface water discharges to the Snake River somewhere between the Buhl Springs reach and the Thousand Springs reach by an estimated 23 cfs this year. However, there is no guarantee of increased water supply to the points of diversion for the Spring Water Users' Water Rights. Accordingly, the Delivery Calls are futile as a matter of law and present no legal basis for curtailment.

20. The Curtailment Order would result in immediate, irreparable and direct harm to Plaintiffs who have no adequate remedy at law and would provide no demonstrable benefit to the Spring Users.

REQUEST FOR DECLARATORY RELIEF

COUNT I

IDWR IS WITHOUT AUTHORITY TO ISSUE THE PROPOSED CURTAILMENT ORDER

21. Idaho Code § 42-237b provides, in relevant part:

[w]henever any person owning or claiming the right to the use of any surface or ground water right believes that the use of such right is being adversely affected by one or more user[s] of ground water rights of later priority . . . such person, as claimant, may make a written statement under oath of such claim to the director of the department of water resources . . . Upon receipt of such statement . . . the

director. . . shall issue a notice setting the matter for hearing before a local ground water board. . . .

(Emphasis added).

22. Further, I.C. § 42-237d provides, in relevant part:

if the statement of the claimant is deemed sufficient by the director of the department of water resources and meets the requirements of section 42-237b, the said director of the department of water resources shall forthwith proceed to form a local ground water board for the purpose of hearing such claim.

(Emphasis added).

23. Thus, Idaho law clearly requires the convening of a ground water board as a pre-requisite to any curtailment of junior-priority ground water users.

24. Idaho Code § 42-237c provides, in relevant part:

If the board finds that the use of any junior right or rights so affect the use of the senior rights, [then] it may order the holders of the junior right or rights to cease using their right during such period or periods as the board may determine and may provide such cessation shall be either in whole or in part or under such conditions for the repayment of water to senior right holders as the board may determine.

(Emphasis added).

25. Thus, a local ground water board is the only entity authorized to curtail junior-priority ground water users.

26. The Delivery Calls filed by the Spring Users are inadequate to establish material injury and have not been deemed adequate by the Director. No local ground water board has been convened or created by IDWR as required by I.C. §§ 42-237b and 42-237d. The required hearing before a local groundwater board has never been conducted. Therefore, the 2005 Orders and the proposed Curtailment Order are null, void and without legal effect.

COUNT II

THE DELIVERY CALLS ARE INVALID BECAUSE THE SPRING USERS' WATER RIGHTS ARE SUBORDINATE TO GROUND WATER RIGHTS

27. Plaintiffs restate the allegations of Paragraphs 1-20 and incorporate the same by reference as though set forth fully herein.

28. Under Idaho law, the holder of a senior-priority date water right cannot lawfully make a delivery call and force curtailment of a junior priority-date water right to which the senior is subordinated.

29. The Spring Users' water rights were subordinated as a matter of law to all junior ground water rights in conjunction with a settlement agreement entered into between the State of Idaho and Idaho Power Company on October 25, 1984, commonly known as the "Swan Falls Agreement," a copy of which is attached hereto as Exhibit E and incorporated by reference. The Swan Falls Agreement was approved and codified by the Idaho legislature in 1985. *See* I.C. 42-203, 42-203A, 42-203B, 42-203C, 42-203D, 42-1406A et. seq., 42-1734A, 1734B, 42-1736B, and 42-1805. Among other things, the Swan Falls Agreement protected upstream ground water development from curtailment during the irrigation season so long as flows in the Snake River at the Murphy Gauge meets or exceed 3,900 cfs.

30. Further, as part of the Swan Falls Agreement, the State of Idaho agreed to honor its commitments and to adhere to the policies set forth in the State Water Plan issued by the Idaho Water Resource Board and approved by the Idaho Legislature. Swan Falls Agreement Exhibit E at ●4; see also I.C. §42-1734B(4).

31. The Idaho State Water Plan adopted by the Idaho Water Resource Board on December 29, 1976, states in relevant part:

No specific allocation of water is made for aquaculture uses. Water necessary to process aquaculture products is included as a component of the municipal and industrial water allocation. Aquaculture is encouraged to continue to expand when and where water supplies are available and where such uses do not conflict with other public benefits. Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, aquaculture interests may need to construct different water diversion facilities than presently exist

p. 118 (Emphasis added). This portion of the Idaho State Water Plan is attached hereto as Exhibit F and incorporated herein.

32. The Idaho State Water Plan adopted by the Idaho Water Resource Board on January 19, 1982, provides in relevant part:

No specific allocation of water is made for aquaculture uses. Water necessary to process aquaculture products is included as a component of the municipal and industrial water allocation. Aquaculture is encouraged to continue to expand when and where water supplies are available and where such uses do not conflict with other public benefits. Future management and development of the Snake Plain aquifer may reduce the present flow of springs tributary to the Snake River. If that situation occurs, adequate water for aquaculture will be protected, however, aquaculture interests may need to construct different water diversion facilities than presently exist.

p. 44 (Emphasis added). This portion is attached hereto as Exhibit G and incorporated herein.

33. The 1986 Idaho State Water Plan, adopted by the Idaho Water Resource Board on December 12, 1986, in Policy 5G, provides in relevant part:

The minimum flows established for the Murphy gauging station should provide an adequate water supply for aquaculture. It must be recognized that while existing water rights are protected, it may be necessary to construct different diversion facilities than presently exist.

p. 38 (Emphasis added). This portion is attached hereto as Exhibit H and incorporated herein.

34. Pursuant to the Swan Falls Agreement and the Idaho State Water Plan, the Spring Users' Water Rights are subordinate to ground water rights, including Plaintiffs' water rights, so long as the minimum flows at the Murphy Gauge are met.

35. The Spring Users' Water Rights have adequate water supply as a matter of law so long as minimum flows are met at the Murphy Gauge. Otherwise, the water rights of Idaho Power Company would be increased by reason of the curtailment of ground water users in violation of the Swan Falls Agreement, which would circumvent and defeat the very purpose of the minimum stream flows established in the Swan Falls Agreement.

36. As a part of the Swan Falls Agreement it was understood and agreed that ground water pumping within the Eastern Snake Plain Aquifer could reduce the flow of springs tributary to the Snake River to the extent minimum flows at the Murphy Gauge met or exceeded 3,900 cfs. It was further understood that the Spring Users may be required to change their diversion facilities to maintain or improve their water supplies, but that the Spring Users could not curtail other ground water users.

37. The Idaho Water Resource Board acknowledged the requirement that the Spring Users may be required to change their diversion facilities in its 1976 and 1982 State Water Plans and again in its 1986 State Water Plan Policy 5G:

It is recognized, however, that future management and development of the Snake River Plain aquifer may reduce the present flow of springs tributary to the Snake River, necessitating changes in diversion facilities.

(Emphasis added). See Exhibit H.

38. By reason of the foregoing, the Spring Users' Water Rights are subordinate to Plaintiffs' ground water rights. Therefore, the Spring Users have no lawful right to make a delivery call and the Director's 2005 Orders and the proposed Curtailment Order is invalid as a matter of law.

39. Based on the foregoing, the 2005 Orders and the proposed Curtailment Order are null, void and without any legal effect.

COUNT III

IDWR'S 2005 ORDERS AND THE PROPOSED CURTAILMENT ORDER EXCEED ITS AUTHORITY

40. Plaintiffs restate the allegations of Paragraphs 1-20 and incorporate the same by reference as though set forth fully herein.

41. Idaho Code § 42-607 governs the distribution of water among appropriators and gives the watermaster, under the direction of the IDWR, the authority to "distribute waters of the public stream, streams, or water supply, comprising a water district," and "to shut and fasten, or cause to be shut or fastened . . . the headgates of the ditches or other facilities for diversions of water from such stream, streams, or water supply, when in times of scarcity of water it is necessary so to do in order to supply the prior rights of others in such stream or water supply . . ." (emphasis added).

42. IDWR's 2005 Orders and the Proposed Curtailment Orders are based on the latest version of the Eastern Snake River Aquifer Model (the "Model"). However, the Model cannot guarantee with any certainty that the proposed curtailment of Plaintiff's water rights will increase discharges from a particular spring.

43. IDWR cannot make any certain prediction that curtailment of junior-priority ground water users will actually supply water to the Spring Users' Water Rights in a timely manner or in a

quantity that is useable by the Spring Users. Accordingly, IDWR's proposed Curtailment Order is without supporting factual or legal basis as a matter of law.

44. Any relief that would be intended by the proposed Curtailment Order is unknown and speculative and exceeds the IDWR's statutory authority which requires that the curtailment actually supply water to the senior water right holder. Thus, the proposed Curtailment Order is legally insufficient to support any curtailment of the lawful and vested water rights of Plaintiffs.

45. The proposed Curtailment Order will result in immediate, irreparable and direct harm to Plaintiffs who have no adequate remedy at law and would provided no demonstrable benefit to the Spring Users.

COUNT IV

THE DELIVERY CALLS ARE INVALID BECAUSE THE SPRING USERS' WATER RIGHTS ARE SUPPLIED BY WASTE WATER

46. Plaintiffs restate the allegations of Paragraphs 1-20 and incorporate the same by reference.

47. The Spring Users' Water Rights are supplied in part from natural discharges and in part from artificially increased aquifer levels resulting from waste water incidental to flood irrigation and winter canal flows. The incidental losses from flood irrigation practices on the Eastern Snake Plain occurred from the late 1800s, with maximum flood irrigation in the early 1950s. The practice of flood irrigation on the Eastern Snake Plain diminished starting in the 1950s and has continued to diminish as irrigation efficiencies have become more readily available. The winter canal flows occurred annually from November through March until completion of the Palisades Reservoir Project in 1961.

48. The alleged shortage in the Spring Users' Water Rights which forms the basis of their delivery calls is the result of a recession in artificially increased aquifer levels and spring discharges. The increased spring discharges peaked in the early 1950s and thereafter declined to current discharge levels—which still remain well above base-line historic natural discharge levels. This recession of artificially increased spring discharges occurred as the result of the gradual conversion from flood to sprinkler irrigation practices on the Eastern Snake Plain on lands lying above and upstream from the Snake River Canyon wall from which the subject springs emerge. In addition to improved irrigation delivery efficiencies, the construction of storage reservoirs at Jackson Lake, Palisades, Grassy Lake, Island Park and American Falls contributed to the decline in the current spring discharges as the result of stored flows and the termination of winter canal flows.

49. The Spring Users' Water Rights were licensed and decreed at a time when spring discharges peaked congruent with peak flood irrigation and winter canal flow practices. Consequently, the Spring Users' Water Rights were artificially inflated by flood irrigation and winter flow waste water.

50. As a matter of law the Spring Users can only make a lawful delivery call for natural supplies historically provided from the aquifer which have not diminished. The Spring Users have no lawful basis to call out and curtail groundwater users to secure a supply of waste water that no longer exists due to changed irrigation practices.

51. Based on the forgoing, the 2005 Orders and the proposed Curtailment Order are null, void and without legal effect.

COUNT V

**2005 ORDERS AND THE PROPOSED CURTAILMENT ORDER ARE
INVALID BECAUSE NO REASONABLE PUMPING LEVEL
HAS BEEN ESTABLISHED**

**THE SPRING USERS' WATER RIGHTS ARE
GOVERNED BY IDAHO CODE 42-226 et seq.**

52. Plaintiffs restate the allegations of paragraphs 1-20 and incorporate the same by reference as though set forth fully.

53. As an alternative cause of action, Plaintiffs allege that the Spring Users' Water Rights should properly be administered as ground water rights according to Idaho Code §§ 42-226 et seq. As such, the Spring Users exercise of their water rights is only protected to the extent of a reasonable pumping level. See I.C. § 42-226, and *Baker v. Ore-Ida Foods, Inc.*, 95 Idaho 575, 513 P.2d 627 (1973).

54. Historically, the Spring Users' Water Rights were considered by IDWR as ground water.

55. Thus, the Spring Users cannot establish injury until such time as they have reached reasonable pumping levels as established by IDWR. No reasonable pumping level has been established. Therefore, no finding of material injury is valid and any curtailment order is arbitrary and capricious and without a basis in law or fact.

56. Furthermore, and in addition, the Spring Users' Water Rights properly constitute artesian wells pursuant to the definition of artesian wells provided in I.C. § 42-1604 and are thus governed by I.C. § 42-226 et seq.

57. Based on the forgoing, the 2005 Orders and the proposed Curtailment Order are null, void and without legal effect.

COUNT VI

SPRING USERS' MEANS OF DIVERSION ARE UNREASONABLE

58. Plaintiffs restate the allegations of Paragraphs 1-20 and incorporate the same by reference as though set forth fully.

59. The Spring Users' Water Rights divert water from developed spring sources. The means of diversion upon which the Spring Users rely is by pressurized ground water or artesian pressure which causes water to flow from the Snake River Canyon wall in the Hagerman area.

60. Reliance upon on pressurized ground water or artesian pressure is neither a reasonable means of diversion nor a legally protected means of diversion. Junior-priority ground water rights cannot be lawfully curtailed to guarantee artesian flow or pressure.

61. The Spring Users are required to have a reasonable means of diversion. *Schodde v. Twin Falls Water Co.*, 224 U.S. 107 (1911) and *State ex rel. Crowley v. District Court*, 89 P.2d 23 (1939). See also, *American Falls Reservoir Dist. No. 2 v. Idaho Dep't of Water Resources*, 2007 WL 677947 (Idaho March 5, 2007). The Spring Users' current means of diversion is unreasonable.

62. The Spring Users' current means of diversion which unreasonably relies on pressurized ground water or artesian flow results in the Spring Users unlawful control of the entire ESPA.

63. The Idaho State Water Plans contemplated that the Spring Users must change their means of diversion. See Exhibits F-H attached hereto. At the very least, the Springs Users are estopped from making any delivery call until such time that they have made the necessary changes in the diversions facilities as contemplated by the Idaho State Water Plans.

64. Idaho law promotes the maximum use and benefit of the state's water resources. I.C. §§ 42-226, 42-1731, 42-1734A(1). Relying on an unreasonable means of diversion unlawfully usurps

the State's rightful authority to manage the State's ground water resources for the protection of all of Idaho citizens for the purpose of promoting the maximum and most beneficial use of the state's water resources. *See Shokal v. Dunn*, 109 Idaho 330, 707 P.2d 441 (1985).

65. Based on the forgoing, the 2005 Orders and the proposed Curtailment Order are null, void and without legal effect.

COUNT VII

THE DELIVERY CALLS ARE FUTILE

66. Plaintiffs re-allege and incorporate paragraphs 1-20 by reference as though set forth fully herein.

67. Even if the 2005 Orders are valid and the proposed Curtailment Orders were to be issued, no appreciable amount of water would result in the spring sources upon which the Spring Users' Water Rights rely.

68. The Model upon which the 2005 Orders and the proposed Curtailment Orders rely cannot predict that an amount of water will result in the actual spring source from which the Spring Users' Water Rights rely. The basis upon which IDWR determined the area and priority date of the alleged injury by groundwater users to the Spring Users Water Rights is without supporting basis and therefore arbitrary, capricious and invalid.

69. Any curtailment of Plaintiffs' water rights would be futile as a matter of law for the reason that the proposed curtailment would not result in an amount of water that could be beneficially used by the Spring Users and would violate the requirements under Idaho law of full economic development and maximum beneficial use.

70. Based on the forgoing, the 2005 Orders and the proposed Curtailment Order are null, void and without legal effect.

COUNT VIII

THE PROPOSED CURTAILMENT ORDERS WOULD CONSTITUTE A TAKING WITHOUT DUE PROCESS AND JUST COMPENSATION

71. Plaintiffs re-allege and incorporate the preceding paragraphs by reference as though set forth fully herein.

72. The water rights proposed to be shut off by the 2005 Orders and the proposed Curtailment Order are owned by Plaintiffs' members and constitute private property rights that cannot be taken or impaired without due process of law.

73. By proposing to shut off Plaintiffs' water rights without a hearing and in excess of its statutory authority and in violation of I.C. §§ 42-237b-d, IDWR's actions violate Plaintiffs' right to due process and would constitute a taking in violation of constitutions of the State of Idaho and of the United States.

74. Shutting off diversion under Plaintiffs' water rights without authority or in violation of Idaho law constitutes a physical taking of Plaintiffs' water rights.

75. In the alternative, shutting off diversion under Plaintiffs' water rights without authority or in violation of Idaho law constitutes a regulatory taking of Plaintiffs' water rights.

76. Plaintiffs have repeatedly requested yet have been deprived by IDWR of a hearing on the 2005 Orders, which Plaintiffs are entitled to and is necessary to assert the defenses set forth in this Complaint. Attached hereto as Exhibit I and incorporated herein by reference are copies of the *Petition for Reconsideration of Director's May 19, 2005 Order; Request for Hearing and Motion for Stay (Blue Lakes Delivery Call);* and *IGWA's Petition for Reconsideration of July 8, 2005, Order and Request for Stay (Clear Springs)*. In addition, Plaintiffs in good faith have provided replacement water plans for the past three years in which they have repeatedly made specific requests for a

hearing. Most recently in North Snake Ground Water District and Magic Valley Ground Water District's Joint Replacement Plan for 2007, copy of which is attached as Exhibit J, Plaintiffs again reiterated their request for a hearing.

77. Plaintiffs are entitled to a hearing on this matter of law. IDWR's continual failure to hold the hearings on the 2005 Orders deprives Plaintiffs of due process of law and curtailing their water rights deprives them of their property rights in violation of due process.

78. Because IDWR has failed, refused, and continues to refuse to hold an evidentiary hearing on the 2005 Orders, and yet is proceeding to issue the Curtailment Order based on the 2005 Orders, Plaintiffs are deprived of presenting administratively their defenses and legal positions. Thus, Plaintiffs are without any speedy and adequate remedy in the ordinary course of law.

79. IDWR cannot take private property rights without due process and without first paying just compensation for the private property rights so taken.

WRIT OF PROHIBITION

80. Plaintiffs re-allege and incorporate the preceding paragraphs by reference as though set forth fully.

81. Issuance of the proposed Curtailment Order exceeds IDWR's statutory authority where IDWR intends to act (1) without having complied with Idaho Code §§ 42-237a-g or 42-607; (2) in breach and violation of the State of Idaho's contractual obligations under the Swan Falls Agreement; (3) based upon invalid Delivery Calls; (4) without having provided Plaintiffs with a meaningful notice and opportunity to be heard in violation of Plaintiffs' due process rights; (5) arbitrarily and capriciously because the proposed curtailment order is improperly based on a Model that cannot predict increased discharges to the Spring Users; and (6) without conducting any analysis of which water users in fact are senior to Plaintiffs.

82. Plaintiffs lack a plain, speedy and adequate remedy in the ordinary course of law, which would protect them from the immediate resulting harm if IDWR issues the Curtailment Order and shuts off Plaintiffs' wells.

83. Pursuant to Idaho Code • 7-401 et seq., Plaintiffs are entitled to a writ of prohibition that restrains IDWR from issuing the Curtailment Order until further order from the Court, or, alternatively, for an order requiring IDWR to show cause before the Court why IDWR should not be absolutely restrained from issuing the proposed Curtailment Order.

PRELIMINARY AND PERMANENT INJUNCTION

84. Plaintiffs re-allege and incorporate the preceding paragraphs by reference as though set forth fully herein.

85. IDWR is unlawfully proceeding to enforce its 2005 Orders and the proposed Curtailment Order in excess of its statutory authority and in violation of I.C. §§ 42-237b-d and 42-607.

86. Plaintiffs have no adequate remedy at law.

87. IDWR's proposed Curtailment Order is intended to be issued without any pre-deprivation hearing in violation of Plaintiffs' due process rights.

88. If permitted, the proposed Curtailment Order will cause Plaintiffs immediate and irreparable harm by:

- a. preventing the lawful diversion and use of ground water to beneficial use under licensed, decreed and constitutionally appropriated water rights;
- b. impairing Plaintiffs' access to capital for continued business operations;
- c. foreclosing any further enrollment in certain federally and state funded agricultural programs;
- d. impairing the ability of certain municipalities to provide for the public welfare and safety of citizens;
- e. causing the death and destruction of livestock;

- f. forcing numerous industries and commercial businesses to cease production and close causing untold harm to the economy of the State of Idaho and to the southern region of the state in particular;
- g. resulting in the loss of already planted crops; and
- h. causing grave economic loss to Plaintiffs.

89. If permitted to issue the proposed Curtailment Order IDWR will cause Plaintiffs additional irreparable harm by depriving them of their property right to divert ground water essential to their lawful agricultural, municipal, commercial, industrial, domestic and other beneficial uses.

90. The economic impact of proposed curtailment could approach a negative \$34 million to Plaintiffs in addition to substantial economic loss to the surrounding communities and the State of Idaho, for which there is no adequate remedy at law.

91. Based on the forgoing and pursuant to I.R.C.P. 65, Plaintiffs and their ground water user members are entitled to the entry of a Temporary Restraining Order pending hearing and, following hearing, a Preliminary Injunction precluding IDWR from issuing the Curtailment Order and ordering IDWR to maintain the status quo and prevent irreparable harm and injury during the pendency of this action.

REQUEST FOR ATTORNEYS' FEES AND COSTS

92. IDWR's proposed actions are without reasonable basis in law or fact.

93. Plaintiffs have retained counsel to prosecute this action on their behalf and request that the Court award them reasonable attorneys' fees and costs pursuant to Idaho Code §§ 12-117, 12-120, 12-121 and 12-123 or other applicable law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following relief:

A. For the immediate entry of a Temporary Restraining Order restraining Defendants from issuing any curtailment order based on the Spring Users' Delivery Calls pending hearing on Plaintiffs' request for Preliminary Injunction.

B. For the issuance of an order compelling Defendants to appear and show cause why a Preliminary Injunction should not be issued enjoining Defendants from issuing any curtailment order based on the Spring Users' Delivery Calls and to maintain the status quo and prevent irreparable harm and injury to Plaintiffs during the pendency of this action.

C. For the entry of a Writ of Prohibition and Permanent Injunction restraining Defendants from issuing any curtailment orders against Plaintiffs and their ground water user members based upon any call by the Spring Users.

D. For the entry of a Declaratory Judgment that Defendants are without authority to issue the proposed Curtailment Orders as a matter of law for the reasons set forth in this Complaint.

E. For the entry of a Declaratory Judgment that the Delivery Calls are invalid as a matter of law for the reasons set forth in this Complaint.

F. For the entry of a Declaratory Judgment stating that the Spring Users' Water Rights upon which the proposed Curtailment Order is based are subordinate to Plaintiffs' water rights as a matter of law based upon the Swan Falls Settlement Agreement.

G. For the entry of a Declaratory Judgment that the Spring Users' Water Rights are governed by I.C. § 42-222 et seq. and must comply with the reasonable pumping levels and reasonable means of diversion standards before a Curtailment Order may issue.

H. For the entry of a Declaratory Judgment that the Delivery Calls are futile as a matter of law and therefore any curtailment order is wrongful and unlawful.

I. For the entry of a Declaratory Judgment the Defendants' proposed actions violates Plaintiffs' right to due process under the Idaho Constitution and United States Constitution and constitutes a taking for which compensation is due.

J. For the entry of an Order awarding attorneys' fees and costs pursuant to Idaho Code §§ 12-117, 12-120, 12-121, 12-123, and other applicable authority.

K. For such further relief as the Court determines is just and proper under the circumstances.

DATED this 7th day of May, 2007.

RACINE OLSON NYE BUDGE & BAILEY

By: Randall C. Budge
Randall C. Budge
Attorneys for Plaintiffs

VERIFICATION

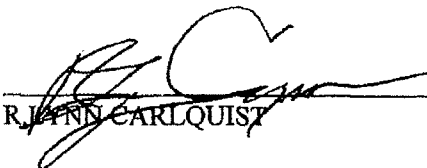
STATE OF IDAHO)

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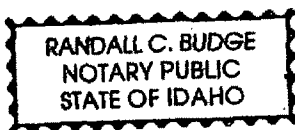
County of Bannock)

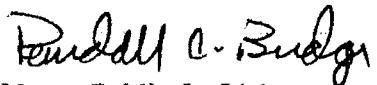
I, LYNN CARLQUIST, being first duly sworn upon oath, depose and state that I am the Chairman of North Snake Ground Water District and that I have read the foregoing Complaint, and based on my personal knowledge believe the facts stated therein to be true and correct.

DATED this 4th day of May 2007.


LYNN CARLQUIST

SUBSCRIBED AND SWORN TO before me this 4th day of May, 2007,




Notary Public for Idaho
Residing at Pocatello, Idaho
Commission Expires: 10-11-12

VERIFICATION

STATE OF IDAHO)

SS:

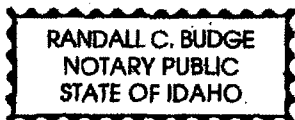
County of Bannock)

I, Orlo Maughan, being first duly sworn, upon oath, deposes and says that I am the Chairman of Magic Valley Ground Water District, and that I have read the foregoing Complaint, and based on my personal knowledge believe the facts stated therein to be true and correct.

DATED this 4th day of May, 2007.

Orlo Maughan
Orlo Maughan

SUBSCRIBED AND SWORN TO before me this 4th day of May, 2007,



Randall C. Budge
Notary Public for Idaho
Residing at Pocatello, Idaho
Commission Expires: 10-11-2012

EXHIBIT L

JUN 12 PM 3 58

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF JEROME

IDAHO GROUND WATER
APPROPRIATORS, INC. MAGIC
VALLEY GROUNDWATER
DISTRICT and NORTH SNAKE
GROUND WATER DISTRICT,

Plaintiffs

vs.

IDAHO DEPARTMENT OF
WATER RESOURCES and DAVID
TUTHILL, JR., IN HIS OFFICIAL
CAPACITY AS DIRECTOR OF
THE IDAHO DEPARTMENT OF
WATER RESOURCES,

Defendants,

and

BLUE LAKES TROUT FARMS,
INC.; CLEAR LAKES TROUT CO.,
INC.; ANITA K. HARDY; RIM
VIEW TROUT COMPANY, INC.;
JOHN W. "BILL" JONES, JR. and
DELORES JONES; CLEAR
SPRINGS FOODS, INC.; RANGEN
INC.; AMERICAN FALLS
RESERVOIR DISTRICT NO. 2;
A&B IRRIGATION DISTRICT;
BURLEY IRRIGATION
DISTRICT; MILNER
IRRIGATION DISTRICT; NORTH
SIDE CANAL CO.; and TWIN
FALLS CANAL CO.,

Intervenors.

Case No. CV 2007-526

ORDER DISMISSING APPLICATION
FOR TEMPORARY RESTRAINING
ORDER, COMPLAINT FOR
DECLARATORY RELIEF, WRIT OF
PROHIBITION AND PRELIMINARY
INJUNCTION

ORDER DISMISSING APPLICATION FOR TEMPORARY RESTRAINING ORDER, COMPLAINT FOR DECLARATORY
RELIEF, WRIT OF PROHIBITION AND PRELIMINARY INJUNCTION

I.

PROCEDURE

1. This matter came before the Court pursuant to an *Application for Temporary Restraining Order and Order to Show Cause and Complaint for Declaratory Relief, Writ of Prohibition, Temporary Restraining Order and Preliminary Injunction* filed May 7, 2007, through counsel, by the Idaho Ground Water Appropriators, *et al.* On May 31, 2007, the case was assigned to this Court based on the disqualification of the Honorable John Butler.
2. Motions to intervene were filed by Clear Springs Foods, Inc., Blue Lakes Trout Farm, Inc., *et al.*, Rangen Inc., John W. "Bill" Jones, Jr. and Delores Jones and American Falls Reservoir District #2, *et al.* ("Surface Water Coalition"). The motions to intervene were granted via a separate order issued June 1, 2007.
3. Motions to dismiss were filed by the Idaho Department of Water Resources and the various intervenors, alleging *inter alia*: the Court's lack of jurisdiction for failure to exhaust administrative remedies.
4. A hearing was held on the matter on June 6, 2007, wherein the Court granted the motions to dismiss and dismissed the action without prejudice, and to avoid further delay, stated the basis for its decision on the record in open court.

II.

ORDER


THEREFORE, for the reasons stated on the record in open court, a copy of the transcript of the Court's oral ruling is attached hereto, the *Motion to Dismiss* is **granted** and the *Application for Temporary Restraining Order, Complaint for Declaratory Relief, Writ of Prohibition and Preliminary Injunction* is **dismissed without prejudice**.

RULE 54(b) CERTIFICATE

With respect to the issues determined by the above judgment or order it is hereby CERTIFIED, in accordance with Rule 54(b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

IT IS SO ORDERED.

Dated June 12, 2007.



HONORABLE JOHN M. MELANSON
District Judge

1 THE COURT: We're on record in Case Number CV
2 2007-526, Idaho Ground Appropriators and others, versus
3 Idaho Department of Water Resources. The parties are
4 present with counsel -- or I should say that counsel for
5 the parties are present, as are counsel for the
6 intervenors. I am prepared to rule from the bench in this
7 matter and I will do so at this time.

8 The doctrine of prior appropriation has been the
9 law in Idaho for over 100 years. It is set forth in our
10 State Constitution at Article 15 and in our statutes at
11 Idaho Code Section 42-106, which was enacted in 1899.
12 Prior appropriation is a just, although sometimes harsh,
13 method of administering water rights here in the desert,
14 where the demand for water often exceeds water available
15 for supply. The doctrine is just because it acknowledges
16 the reality that in times of scarcity, if everyone were
17 allowed to share in the resource, no one would have enough
18 for their needs, and so first in time - first in right is
19 the rule. The doctrine is harsh, because when it is
20 applied, junior appropriators may face economic hardship or
21 even ruin.

22 I say these things in an introductory way so the
23 parties and other people who may be interested will know
24 that I know the possible consequences of my ruling today,
25 and I do not take this decision or its consequence lightly,

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1 but it is a decision that I believe to be mandated by law.
2 My decision today is based simply and solely upon the fact
3 that the plaintiffs have not exhausted their administrative
4 remedies.

5 I do agree that there may be some colorable
6 defenses, such as reasonable pumping levels, futile call
7 and reasonableness of diversion. This, however, is not the
8 proceeding in which those issues should be raised. In
9 American Falls Reservoir District Number Two versus Idaho
10 Department of Water Resources, 143 Idaho 862, in a case
11 decided in March of this year, cited by the parties, the
12 court dealt with strikingly similar circumstances: A
13 declaratory judgment action brought while an administrative
14 proceeding was pending. In American Falls No. 2 it was
15 surface water users challenging the manner and process by
16 which the Director responded to a delivery call against
17 ground water pumpers. The surface water users contended
18 that the Director's response was contrary to law and
19 ultimately unconstitutional. Although both the surface
20 water users and the ground water pumpers, including Idaho
21 Ground Water Users Association, requested a hearing before
22 the Director, prior to the hearing being conducted the
23 surface water users filed an action for declaratory relief
24 challenging, among other things, the constitutionality of
25 the rules of conjunctive management: The very same rules

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1 which govern the Director's response to this call.

2 In American Falls No. 2 the court reaffirmed the
3 long-standing-general requirement that a party not seek
4 declaratory relief until administrative remedies have been
5 exhausted unless that party is challenging the rule's
6 facial constitutionality. The court relied on Idaho Code
7 Section 67-5271 and the Regan versus Kootenai County Case,
8 140 Idaho 721, a 2004 case.

9 In the case now before this court, IGWA, I'll
10 refer to it as both parties have referred to it -- Idaho
11 Ground Water Appropriators Association by its acronym --
12 initially requested a hearing before the director. The
13 hearing was placed on hold when the constitutional
14 challenges to the rules of conjunctive management was
15 raised in American Falls No. 2. Finally, because both
16 cases involved application of the same rules, after the
17 Supreme Court issued its ruling in American Falls No. 2,
18 the Director issued a notice of potential curtailment on
19 May 10, 2007, almost a month ago. Instead of re-noticing
20 or requesting immediate hearing before the Director and
21 arguing its claims and defenses, IGWA filed the instant
22 action. As such, the Director has not developed a
23 full-administrative record and ruling on the claims and
24 defenses raised.

25 Ironically, in American Falls No. 2, IGWA and the

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1 ground water pumpers appeared in defense of the Director's
2 application of the rules, including an argument that the
3 surface water users must first exhaust their administrative
4 remedies before seeking judicial review. In its opening
5 brief on appeal IGWA argued: Moreover, the legislature
6 already has specified the process for resolving challenges
7 to such unlawful agency action. The proper procedure is
8 through judicial review, pursuant to the Administrative
9 Procedures Act, Idaho Code Section 67-5270; not a
10 collateral attack as the plaintiffs have undertaken here.

11 The APA also contains entire sections on agency
12 hearing procedures, evidence, and other related matters,
13 e.g. Idaho Code Sections 67-5242, hearing procedure; and
14 67-5271, evidence. The Department applies these as part of
15 its rules. The district court's approach tosses out
16 administrative law, end quote.

17 That's from the affidavit of Mr. Arrington,
18 Exhibit I to the IGWA opening brief, page six.

19 Apparently the Supreme Court agreed with IGWA,
20 holding that administrative remedies must be exhausted
21 before even constitutional issues can be raised before the
22 District Court, unless there is a facial challenge. The
23 Supreme Court held, quote: Important policy considerations
24 underlie the requirement for exhausting administrative
25 remedies, such as providing the opportunity for mitigating

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1 or curing errors without judicial intervention, deferring
2 to the administrative processes established by the
3 legislature and the administrative body and the sense of
4 comity for the quasi-judicial functions of the
5 administrative body. That's from American Falls No. 2,
6 quoting White versus Bannock County Commissioners, 139
7 Idaho 396, at 401 - 402.

8 Frankly, this Court, despite the differences
9 pointed out by the plaintiffs, has difficulty in
10 meaningfully distinguishing American Falls No. 2 and the
11 instant case. Although American Falls No. 2 dealt with a
12 constitutional challenge, the underlying principles are the
13 same, and the Supreme Court defined the scope of the
14 exceptions to the exhaustion of administrative remedies
15 requirement. The essence of what was at issue in American
16 Falls No. 2 was the manner in which the Director responded
17 to the delivery call. Although the action was argued and
18 analyzed as a facial challenge, the Supreme Court held it
19 was an as-applied challenge, and it held that an as-applied
20 challenge did not provide an exception to the exhaustion of
21 the administrative remedies requirement.

22 The court reasoned, quote: To hold otherwise
23 would mean that a party whose grievance presents issues of
24 fact or misapplications of rules or policies could
25 nonetheless bypass his administrative remedies and go

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1 straight to the courthouse by the simple expedient of
2 raising a constitutional issue. Again, from American Falls
3 No. 2, citing Foremost Insurance versus Public Service
4 Commission 985, S.W. 2d 793.

5 Although IGWA has not framed the issues in terms
6 of a constitutional challenge, it is nonetheless raising
7 issues pertaining to the perceived misapplication of rules,
8 and raising issues of fact and law, which according to the
9 holding in American Falls No. 2, must first be ruled on by
10 the administrative agency prior to seeking judicial review.

11 The surface water users in American Falls No. 2
12 raised issues pertaining to the lawfulness of the
13 Director's response to a delivery call. They simply
14 asserted that the infirmities rose to the level of
15 constitutional proportions because of the property rights
16 at stake. Ultimately, the district court in that case
17 applied a facial challenge analysis because the Director's
18 actions, although alleged to be contrary to law, were
19 consistent with the conjunctive management rules.

20 Nonetheless, the Supreme Court rejected the
21 so-called hybrid approach that is as applied in the facial
22 challenge and held that administrative remedies must first
23 be exhausted. The result of the holding is that whether a
24 party raises legal or factual issues, or alleges that such
25 issues rise to the level of an as-applied constitutional

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1 challenge, administrative remedies must first be exhausted.

2 IGWA has raised two exceptions to the exhaustion
3 of administrative remedies doctrine that were mentioned,
4 but not discussed by the Supreme Court in American Falls
5 No. 2. The first being: When the interest of justice so
6 require; and the second being: When the agency is acting
7 outside the scope of its authority. As I mentioned a
8 moment ago, IGWA was a participant in the American Falls
9 No. 2 case and even advocated dismissal of the case because
10 surface water users had failed to exhaust administrative
11 remedies. The Supreme Court affirmed IGWA's position.

12 The court has difficulty finding the justice
13 required for that exception to exhaustion of administrative
14 remedies doctrine when IGWA has taken one position in one
15 proceeding and then adopted the exact opposite position in
16 a similar proceeding, involving similar issues.

17 The court has considered the justice of the
18 plaintiff's cause. The timing of the proposed curtailment
19 should not have come as a surprise. This case has been
20 going on since 2005, the curtailment was part of a
21 five-year-phased-in curtailment, and it had only been put
22 on hold as a result of the American Falls No. 2 case.
23 Here, the plaintiff's assertion that the interests of
24 justice require the court to exercise authority over the
25 Department before exhaustion administrative remedies, is

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1 not persuasive.

2 As noted at the beginning of my comments, the
3 prior appropriation doctrine sometimes leads to a harsh
4 result, but it is just. If the court were to block this
5 action now, every proposal curtailment would first be
6 decided in the courts instead of where the legislature
7 intended: At the Idaho Department of Water Resources. We
8 would have judicial administration of water rights.

9 Perhaps if the American Falls Case No. 2 had not
10 taken place and there was not a five-year curtailment plan
11 already in place; and IGWA was being notified of the
12 curtailment for the first time after the planting season
13 had already commenced; and if the right to a
14 pre-curtailment hearing were plainly established; and if
15 IGWA did not have the remedy of mandamus; or perhaps other
16 remedies such as the judicial review mentioned, perhaps
17 then their argument that justice requires an exception to
18 exhaustion of administrative remedies would have more
19 merit.

20 The plaintiff's claim that the Director has
21 exceeded his authority is also without merit. The fact is
22 that we do not yet know what the Director will do. The
23 question of the Director's authority must first be raised
24 in the administrative proceeding. Idaho Code Section
25 42-602 vests the Director with the authority to distribute

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1 water from all natural sources within a water district in
2 accordance with the prior appropriation doctrine. All the
3 rights at issue have been reported or adjudicated and have
4 been included within a water district.

5 As far as the operation of the ground water
6 management act, Idaho Code Section 42-237 (a), et seq., and
7 Idaho Code Section 42-602 and 607, the court will direct
8 IGWA's attention to its analysis in its own appellate brief
9 in the American Falls No. 2 case, wherein IGWA asserted
10 that the two processes were independent of each other.
11 Specifically, quote: The rules embody the broad concepts
12 of the act within the context of the department's
13 traditional contested case process; rather than the ground
14 water board proceeding. The board process remains
15 independently available under the act. It's in the
16 affidavit of Mr. Arrington, Exhibit I, the IGWA opening
17 brief, page 11.

18 If the plaintiffs desire a hearing and if the
19 Director fails to conduct that hearing, their remedies may
20 include mandamus, possibly judicial review: Not a request
21 that this court decide the issues that they believe should
22 have been decided in the administrative proceeding.

23 In summary, this action provides a text book case
24 in support of the need for exhaustion of administrative
25 remedies. To date the Director has not ruled on the

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1 underlying claims and defenses. But despite the fact that
2 the same claims, issues and defenses are raised in at least
3 three different jurisdictions, the exhaustion requirement
4 avoids forum shopping, avoids deciding cases on a piecemeal
5 basis, and avoids inconsistent rulings on the same issues;
6 and, frankly, it avoids inconsistent arguments made by the
7 same parties in different forums.

8 The court finds American Falls No. 2 to be
9 directly on point in this matter. Accordingly, it is the
10 decision of this court, and it is hereby ordered, that the
11 defendant's motion to dismiss is granted without prejudice
12 as to refiling after completion of the administrative
13 proceedings, as required by Idaho Code Section 67-5271 in
14 the American Falls Reservoir District case.

15 Because the underlying complaint has been
16 dismissed, the plaintiffs cannot show that they are
17 entitled to a temporary restraining order or a preliminary
18 injunction in this case. The TRO is therefore dissolved
19 and the court shall not issue a preliminary injunction in
20 this matter.

21 That concludes the court's order in this case.

22 The court, of course, doesn't have any
23 jurisdiction at this point to tell the Director what to do,
24 but Mr. Rassier, I'm just going to suggest that the
25 hearings on these matters of law should be conducted with

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1 dispatch. These folks have a right to a hearing, and
2 unless that's done, we're just going to be back here. And
3 if it happens that it really can't be done until later in
4 the summer or in the fall, then certainly the Director
5 would see to it that the matters are concluded
6 expeditiously so we're not back here next spring, perhaps
7 after the crops are planted again. As I said, I don't have
8 jurisdiction to order that. I wouldn't presume to do so.
9 I'm hoping that what I've said will be enough. The court
10 will enter a written order in this matter and judgment will
11 be certified as a final judgment so that appeal may
12 proceed.

13 Is there anything further from the plaintiffs in
14 this matter?
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CERTIFICATE OF MAILING

I, the undersigned, hereby certify that on the 13 day of June, 2007 a true and correct copy of the Order of Assignment was faxed and mailed, postage paid to the following persons.

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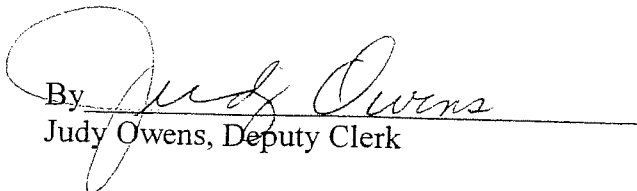
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By 
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CERTIFICATE OF MAILING/DELIVERY